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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 402

JOSEPH DOWNEY, MORTON DOWNEY and OLIVER HARPER,
Petitioners,

vs.

SOUTHERN TOWN CONSTRUCTION and MASSACHUSETTS BONDING & INSURANCE COMPANY,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

JOSEPH DORSEY, MONROE DOWLING and CALVIN HARPER,
Petitioners,

vs.

STUYVESANT TOWN CORPORATION and METROPOLITAN LIFE INSURANCE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners pray that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York, affirming a judgment of the New York Supreme Court in the County of New York, dismissing the complaint herein (R. 268-269).

Opinions Below

The opinion of the Supreme Court (R. 56-64) is reported in 190 Misc. 187. The Appellate Division order of affirmance without opinion (R. 230-231, 237-239) is reported at 274 App. Div. 992. The opinion of the Court of Appeals (R. 240-266) is reported at 299 N. Y. 512.

Jurisdiction

The judgment of the Court of Appeals was entered on July 19, 1949 (R. 268-269). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Constitutional and Statutory Provisions Involved

The pertinent provisions of the United States Constitution, the New York State Constitution, the Redevelopment Companies Law of New York and the New York City Administrative Code are set forth in the Appendix below (pp. 29-43).

Question Presented

The question presented is whether Negroes may constitutionally be excluded because of their race from consideration as tenants in a housing development which was constructed and is operated under the New York State Redevelopment Companies Law and in the construction and operation of which the State and its subdivisions have participated and are participating to the degree disclosed by this record.

The Manner in Which the Federal Question Is Raised

This action was initiated by the filing of a complaint in the Supreme Court of New York, New York County, by the three petitioners against Stuyvesant Town Corporation and Metropolitan Life Insurance Company (R. 66-75). The petitioners sued in behalf of themselves and those similarly situated (R. 71, 74).

Petitioners alleged that respondents operated a housing project known as Stuyvesant Town, that it was constructed under the Redevelopment Companies Law of New

York with public aid and participation (R. 66-70), that the announced policy of respondents was to exclude Negroes from the housing project (R. 71), and that since petitioners were Negroes no apartments would be rented to them (R. 66, 71-72). They stated that in view of the participation by the State and its agencies in creating the housing project, the rejection of petitioners' applications solely because of their race was a denial of equal protection of the laws in violation of Article I, Section 11 of the New York State Constitution and the Fourteenth Amendment to the United States Constitution (R. 72-73). They prayed that respondents be restrained from withholding apartments in the project from petitioners or any others similarly situated because of their race or color (R. 74).

A motion for an injunction *pendente lite* was denied by Justice Benvenga on July 28, 1947 (R. 54, 56-64). The accompanying opinion dealt with the case on the merits and held that the complaint failed to state a cause of action because it disclosed no violation of the Federal or State Constitutions (R. 61).

Subsequently answer was served and issue joined (R. 75-171). Respondents admitted in their answer that it was their policy to exclude Negroes from Stuyvesant Town (R. 77), but denied that such exclusion was unconstitutional (R. 72-73, 77). Motions and cross-motions for judgment on the pleadings were filed (R. 172-173). They were referred to Justice Benvenga who granted respondents' motion and ordered the complaint dismissed for failure to state a cause of action (R. 174-177). In so disposing of the case, Justice Benvenga relied on his earlier opinion denying the motion for an injunction *pendente lite* (R. 174). As noted above, this opinion dealt solely with the constitutional issue.

On appeal to the Appellate Division of the Supreme Court, First Department, the judgment was affirmed unanimously without opinion on December 20, 1948 (R. 237-239).

On further appeal to the New York Court of Appeals, the judgment was affirmed on July 19, 1949 (R. 268-269). The court divided four to three. The opinion of the court was written by Judge Bromley and concurred in by Judges Conway, Lewis and Dye (R. 241-256, 266). A dissenting opinion was written by Judge Fuld with Chief Judge Loughran and Judge Desmond concurring (R. 256-266). The majority ruled that the admitted discrimination violated neither the Fourteenth Amendment to the Federal Constitution nor the corresponding provision of the State Constitution (R. 256). It is plain that determination of the Federal question was necessary to the result, that the question was determined, and that the judgment below could not have been placed on State grounds alone.[1]

Statement of the Facts

Stuyvesant Town lies in the heart of New York City, facing the East River north of 14th Street (R. 67). It has 8,759 apartments, houses more than 25,000 people, and cost $90,000,000 to build (R. 23, 67). The two main avenues and five cross streets formerly traversing the area are now closed at the project's borders (R. 67-68, 101-102). These avenues and streets are now part of the project as the result of an exchange of property with the City which supplied the project with nearly one-fifth of its area (*infra*, pp. 6-7). The new streets in the project are private and are so marked at the entrances (R. 69, 103).

The area was formerly a slum in which some 10,000 families lived (Answer, Exh. 4, pp. 7, 20).[2] These families

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[1] Simultaneously with the filing of the complaint herein a complaint was filed by Shad Polier against respondents and the Mayor and Board of Estimate of the City of New York. Mr. Polier sued as a taxpayer, alleging the same facts as were alleged in the complaint herein. Throughout the proceedings in the state courts the two cases were consolidated. The Court of Appeals unanimously dismissed the appeal in the Polier action on non-federal grounds (R. 242, 266), and the plaintiff in that action is not seeking review in this Court.

[2] Pursuant to stipulation (R. 225-226) this exhibit to the answer was not printed in its entirety. Copies have been filed with the Clerk of this Court.

were evicted and the area was assembled by exercise of the City's power of condemnation (*infra*, p. 6).

Controls imposed on Stuyvesant Town by statute and by its contract with the City restrict the profits to be derived and limit the rents which may be charged (*infra*, pp. 13, 14), although there is no upper limit on the income of the tenants who may be accepted. The reduced rents which these tenants enjoy are made possible by a tax exemption amounting to $50,000,000 over a 25-year period (*infra*, p. 7) as well as by the other benefits already described.

The benefits which make the project and the reduced rents possible are contributed by all City taxpayers, Negroes as well as whites. However, under respondents' policy, no Negroes have been admitted (*infra*, pp. 7-8). Respondents contend, and petitioners deny, that the Federal and State Constitutions, the applicable statutes and the arrangement with the City permit adoption of this policy.

The State Constitution and Statute.

The New York State Constitution adopted by the people in 1938 contained a separate article on housing which provided among other things for "the clearance, replanning, reconstruction and rehabilitation" of blighted areas (N. Y. Const., Art. XVIII). The Redevelopment Companies Law (L. 1942, Ch. 845, as amended by L. 1943, Ch. 234, and L. 1947, Ch. 840; McKinney's Unconsolidated Laws, Sections 3401-3426), was enacted in pursuance of that objective (Act, Sec. 2). In extensive statutory findings the Legislature recognized the existence "of sub-standard and insanitary conditions" and concluded that "these conditions cannot be remedied by the ordinary operations of private enterprise" (*ibid.*). Accordingly the statute provided for the redevelopment of sub-standard areas by privately owned redevelopment companies acting with "the cooperation of the state and its sub-divisions" and receiving "public assistance" (*ibid.*).

The statute spelled out in some detail the "cooperation" and "assistance" which municipalities were to provide. The land to be rehabilitated was to be condemned by the municipality and then conveyed to the redevelopment company at cost (Act, Sec. 20). Authority was given to grant tax-exemption on the value of the improvements for up to 25 years (Act, Sec. 26). The municipality could close and transfer public streets to the redevelopment company (Act, Sec. 20).

In exchange for these benefits, the Act provided for extensive control of the activities of the redevelopment company including its financing, its construction of housing and the disposition of its property (Act, Secs. 15, 23). It was specifically provided that "the project or projects of any redevelopment company shall be designed and used primarily for housing purposes . . ." (Act, Sec. 14). To insure that the benefits of the public assistance would flow to the tenants of the housing and not to the redevelopment company, profits were limited to 6% and the municipality was required to provide for appropriate limitations on rents (Act, Secs. 8, 15).

The Contract with the City.

In 1943, the City of New York, the Metropolitan Life Insurance Company and Stuyvesant Town Corporation, a wholly owned subsidiary of Metropolitan, entered into a contract for the construction of the housing project to be known as Stuyvesant Town (R. 79-80, 87-125). It provided for the assembling through condemnation of an 18-block tract in the Borough of Manhattan lying between 14th and 20th Streets, 1st Avenue and Avenue C and the East River Drive (R. 72, 96-97, 99). The City was to close and convey to Stuyvesant all public streets within the project in return for conveyance to the City by Metropolitan of strips along the border (R. 101-103). The net gain to respondents by this aspect of the contract was more than 500,000

square feet, or nearly 19% of the 2,600,000 square feet of the site area (R. 68-69). The contract further provided that the City would "plan and replan, zone and rezone, the area . . . in such manner as may be practicable and suitable for the operation of the project" (R. 116). Finally, tax-exemption on the improvements was granted for 25 years (R. 108-110). The tax-exemption comes to above $2,000,000 per year (R. 69), or $50,000,000 over the full 25-year period.

Stuyvesant, under the contract, undertook to clear the area conveyed by the City and to construct the project (R. 100-113). Metropolitan guaranteed the financing of the project and its performance by Stuyvesant (R. 112-113, 121).

The project, which has since been virtually completed, contains 8,759 apartments in 35 buildings (R. 67, 70). Its population of more than 25,000 is therefore larger than all but 25 cities in New York State (16th Census of the U. S., 1940-Population, Vol. I, pp. 710-712).

The Discrimination against Negroes.

The first intimation that Negroes would be excluded from the project was given by Frederick H. Ecker, Chairman of the Board of Metropolitan, prior to the hearing on June 3, 1943, before the New York City Board of Estimate which had power under the statute to approve or disapprove the contract. Mr. Ecker's statement that "Negroes and Whites don't mix" and that therefore Negroes would be excluded (Answer, Exh. 4, p. 26), was referred to by many of the witnesses who appeared at the hearing to oppose approval of the contract because of the threatened discrimination (Answer, Exh. 4, pp. 26, 32, 41, 43, 45, 49, 51, 54, 56, 57, 58, 62). Mr. Ecker, however, appearing as the second witness at the hearing, refrained from either admitting or denying the existence of the policy (R. 158-159; and see Answer, Exh. 4, p. 67).

The contract was approved by a vote of 11 to 5 (R. 160-170). The President of the Council, who cast 3 of the 5 negative votes, plainly indicated his understanding that the Board's action constituted an affirmative approval of discrimination (R. 165-168).

Thereafter, in 1944, the City enacted an amendment to its Administrative Code (Sec. J41-1.2) forbidding racial discrimination in tax-exempt developments; it expressly excepted, however, any project "heretofore agreed upon or contracted for" (App., *infra,* p. 43). As the dissenting judges below noted, this exception "could relate only to Stuyvesant Town", the only project at that time agreed upon (p. 259).

Upon approval of the Stuyvesant Town contract by the Board of Estimate, a taxpayer's action was started to halt the discrimination. Respondents, however, forestalled a test of the issue at that time by pleading that the Directors of Metropolitan had "thus far not adopted any renting policy and that they will have no occasion to do so until the project approaches completion" (position summarized in Opinion of Justice Shientag in *Pratt* v. *LaGuardia,* 182 Misc. 462, 468 (1944), aff'd 268 A. D. 973, leave to appeal denied, 294 N. Y. 842). Because no final renting policy had been announced and the project was not yet under way, respondents won dismissal of the suit on the ground that it was premature. Stuyvesant Town was warned at that time, however, that it "will have to perform its contract . . . in obedience to the fundamental law" and that "if it adopts an illegal renting policy any person thereby aggrieved will have his remedy in the courts" (182 Misc. at 469).

Correspondence with officers of Metropolitan during 1946 and 1947 finally established that they had not at any time departed from their policy of excluding Negroes (R. 72, 39-41, 16-17). After the present action was started, the existence of the policy, as we have already noted, was formally admitted (R. 77).

The three petitioners are Negroes, and, as honorably discharged war veterans,[2a] are fully qualified for acceptance as tenants in Stuyvesant Town (R. 66, 70-71). They have applied for apartments but because of respondents' policy of discrimination, their applications have not been and will not be considered or accepted (R. 70, 71-72).

Specification of Errors

The court below erred:

1. In holding that respondents' discrimination against petitioners because of race, did not violate the Fourteenth Amendment to the United States Constitution.

2. In failing to hold that the benefits of the New York Redevelopment Companies Law must be made available without discrimination because of race.

3. In failing to hold that petitioners' complaint stated a cause of action against respondents.

4. In affirming and failing to reverse the judgment of the New York Supreme Court as affirmed by the Appellate Division.

5. In failing to direct entry of a judgment for petitioners on the pleadings.

Reasons for Granting the Writ

We submit that the court below decided a substantial question regarding the Federal Constitution in a manner not in accord with applicable decisions of this Court. We urge (1) that the question has been decided erroneously by the court below and (2) that the question is substantial and of general importance.

[2a] Respondents are required by 50 U. S. C. App. 1884 to give preference to veterans.

I

The Court of Appeals decided a Federal question in a way not in accord with applicable decisions of this Court.

A. The Court of Appeals correctly noted that "the policy of respondents could not be followed by a governmental body" (R. 252). It held, however, that Stuyvesant Town did not fall within this rule—that the discrimination against petitioners was not "state action" within the meaning of that phrase as used by this Court in construing the Fourteenth Amendment (R. 254-256). We submit that the Court of Appeals viewed the phrase too narrowly.

The ultimate test here is not whether respondents "are representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." *Nixon* v. *Condon,* 286 U. S. 73, 89 (1932).

In applying that test, the entire Stuyvesant Town operation must be viewed in the round. It will not do to take each element of state participation and control and determine separately whether that element alone would have required imposition of constitutional restraints. The question is whether, in view of what Judge Fuld called "the total background" (R. 259), respondents may be placed in the same category as the owner of a two-family house.

When a similar test was applied to the company town of Chickasaw in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), this Court held that it could not be treated as a simple private domain. It said, "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" (326 U. S. at 506). Similarly, the more an owner accepts state

"assistance" and "cooperation" for the creation of property interests which he could not otherwise acquire, the more his rights are circumscribed. For "it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U. S. 501 (1946)." *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948). We believe, with the dissenting judges below, that, "All in all, the resemblance between Stuyvesant Town and the company town of *Marsh* v. *Alabama* (326 U. S. 501, *supra*) is strong, the analogy between this case and that one, clear" (R. 263).

We discuss next the various elements of state participation in the Stuyvesant Town operation which subject it to the constitutional restraint upon discrimination. We submit that, whatever the effect of these elements when viewed separately, when they are taken together the project cannot be held to be "entirely devoid of governmental character." *Kerr* v. *Enoch Pratt Free Library,* 149 F. 2d 212, 219 (C. C. A. 4, 1945), cert. denied, 326 U. S. 721.

B. The housing accommodations from which petitioners were barred because of race were made available through the exercise of exclusive state powers; they were constructed and are now available because of the cooperation of the State and under the supervision of the State; state controls place a ceiling on the rents which may be charged; and the entire project was conceived and executed to serve a purpose declared by the State Legislature to be a public purpose.

1. Judge Fuld correctly noted that "The exercise of a number of governmental functions was absolutely prerequisite" to the existence of Stuyvesant Town (R. 263). The essential feature of this project is that it provides 8700 families with moderate rent housing. Each of these families has the benefit of a reduction in the rent which it would have to pay in unassisted, unregulated housing.

a. The rent reduction was admittedly achieved in large measure by the tax exemption which the statute describes as "public assistance" (Act, Sec. 2). The Chairman of the Board of respondent Metropolitan has recognized that this assistance "is for the benefit of the tenant. By reason of that exemption we are able to rent to a tenant at substantially less than it would be rented if it were not for the benefit of the exemption" (R. 156).

This $50,000,000 subsidy (*supra*, p. 5) is paid for in increased taxes levied upon the rest of the City. The dissenting judges, therefore, properly concluded that "As citizens and residents of the City, Negroes as well as white people have contributed to the development. Those who have paid and will continue to pay should share in the benefits to be derived" (R. 266).

b. Use of the power of eminent domain also contributed to making lower rents possible by reducing the initial capital investment. Respondents acquired the land from the City at cost. Under Section 20 of the statute, awards were made without considering increase in value due to assembly or reconstruction. Obviously, the assembling of so large a tract in the heart of the City gave rise to plottage values which are incalculably large.

In fact, however, the plot could not have been put together at all, and the project could not have been built, without condemnation. Included within the land condemned here were city streets, an existing public school (R. 101-102, 149-150), and property owned by a limited dividend company providing housing for low income families. *Stuyvesant Housing Corp.* v. *Stuyvesant Town Corp.*, 183 Misc. 662 (1944). To achieve this result the statute had to declare the use to which the land was put to be a "superior public use" (Act, Sec. 20). It is this "superior public use" which is now being made available discriminatorily.

c. Streets equalling nearly 19% of the area were turned over to respondents (R. 68-69) and the supervision nor-

mally exercised by the municipality over these streets is now exercised by the corporation (R. 103). Here again the City made an indispensable contribution to the construction of the enterprise. Without this exercise of government powers this moderate rent housing project would not have come into being.

2. Having made grants and concessions to respondents with the aim of ultimately benefiting tenants, the State and City retained certain controls over the project in order to insure the construction and operation of moderate-rent housing. These special government controls, which are inapplicable to other landlords, are designed to insure that the benefits of the public assistance will flow to the public and not to respondents. The court below, in an earlier case involving the constitutionality of the statute, recognized that this "public control" was an essential aspect of the statutory scheme. *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, 332 (1943).

a. Central to this "public control" is the provision of Section 14 of the Act that "the project or projects of any redevelopment company shall be designed and used primarily for housing purposes. . . ." Section 23 of the Act forbids sale of the project without the consent of the local legislative body. Sections 5 and 15 establish a supervising agency which must consent to the method of incorporation, to the method of financing and to the use to which the project is to be put. Section 15 also requires approval of the City for any modification of the contract.

b. Having insured the creation of the housing, the statute then proceeds to insure that only moderate rents will be charged. Section 8 limits profits to 6% and Section 15 provides for rent regulation and for approval by the city of any rent increase.

c. The statute also gives the City ample power to prevent racial discrimination. Section 15 of the Act provides that the contract may include not only regulations upon

rents but also such provisions as may be "necessary or desirable" for the "operation and supervision of the project". Under this broad grant, the City had ample power to include in the contract a ban on the discrimination of which it was warned (*supra*, pp. 7-8).

d. All the statutory controls are reaffirmed in the contract (R. 87-89). The contract originally provided that the average rental would not exceed fourteen dollars per room per month (R. 111). The City subsequently agreed to raise this maximum to seventeen dollars (R. 127-132).

3. Finally, the creation of benefits in the form of 8700 moderate rent apartments in the heart of New York City by the tax exemption and other benefits, was an intended objective of the statute and contract. It was this objective which prompted the State and City to enter into "cooperation" with private interests and which shaped the nature and extent of that cooperation.

In Section 2 of the Act, the New York Legislature found that there was a need for "a sufficient supply of adequate, safe and sanitary dwelling accommodations." It declared that the "provision of adequate . . . housing" is a "public use and purpose" and extended "public assistance" and "the cooperation of the State" to agencies, instrumentalities and corporations like Stuyvesant Town created for the purpose of attaining "the ends herein recited"; that is, the "provision of adequate . . . housing".

In Section 4(13) of the Act, the Legislature directed that a redevelopment company's certificate of incorporation contain "a declaration that the redevelopment company has been organized to serve a *public purpose* and . . . that all real and personal property acquired by it and all structures erected by it, *shall be deemed to be acquired or created for the promotion of the purposes of this Act.*" (Italics supplied.) The public purpose was not only slum clearance but the moderate rent housing made possible by the condemnation, tax exemption, and cession of streets.

The "public purpose" could have been achieved by the State directly. Under appropriate constitutional and statutory provisions it could have erected the Stuyvesant Town development in its own name. It chose instead to use its exclusive powers to make possible its erection through the "cooperation" of the State and private enterprise. It is our position that the State could not, by making that choice, diminish the applicability of the constitutional prohibition of discrimination. "No one claims or even suggests," said Judge Fuld, "that the City adopted an alternative strategem to effect discrimination, but it may not be gainsaid that the development plan, the contract and the local law brought about precisely the same situation as if the City had zoned or leased a 'white' development. We draw distinctions too fine and too subtle when we say that the several cases are different or that they merit different consideration" (R. 265).

C. We submit that on these facts the decision below is in conflict with the principles laid down in *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Rice* v. *Elmore*, 165 F. 2d 387 (C. C. A. 4, 1947), cert. denied, 333 U. S. 876; *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. C. A. 4, 1945), cert. denied, 326 U. S. 721, and other cases.

1. The discrimination here satisfied the "but for" test used by this Court in the *Shelley* case, *supra* (334 U. S. at 19). This is not a case where the State has "merely sustained from action" (*ibid*). Rather, it has made available "the full coercive power of government" (*ibid*). This Court recognized in that case that the Fourteenth Amendment "erects no shield against merely private conduct" (*id.* at 13). It went on to say, in words equally applicable here, "But here there was more" (*ibid*). Stuyvesant Town wears "the full panoply of state power" (*id.* at 19)

and "bears the clear and unmistakable imprimatur of the State" (*id.* at 20).

In entering into the contract with the City under the Redevelopment Companies Law, Stuyvesant Town became obligated to build and lease moderate rent housing. It therefore acquired "character as a state agency from the duties imposed upon it by state statutes." *Smith* v. *Allwright, supra,* 321 U. S. at 663. Operating and governing a community with a population of more than 25,000, it is "clothed with power not unlike that of a legislature which is subject to constitutional limitations." *Steele* case, *supra,* 323 U. S. at 199. It is equally clear that the State exercised "so great a degree of control over the activities and existence . . . [of Stuyvesant Town] . . . that it would be unrealistic to speak of it as a corporation entirely devoid of governmental character". *Kerr* case, *supra,* 149 F. 2d at 219.

2. An essential principle of these cases is that discrimination may fall within the constitutional ban even if it originates with private individuals. Thus this Court said in the *Shelley* case (334 U. S. at 20): "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." In *Smith* v. *Allwright, supra* (321 U. S. at 663), this Court held that a private organization, a state Democratic Party, was "an agency of the state *in so far as it determines* the participants in a primary election" (italics supplied). So here, Stuyvesant Town is a state agency "in so far as" it determines the beneficiaries of the exercise of state powers.

3. The private parties whose discrimination was curbed in the decisions cited above were all subjected to restraints not generally applicable to private individuals. That fact was considered by the Circuit Court of Appeals for the Fourth Circuit in the *Kerr* case, *supra,* which held that

the private trustees of a privately-founded, state-supported library were prohibited from engaging in racial discrimination. The court said that the original donor of the library "could have formed a private corporation . . . with power both to own the property and to manage the business of the Library independent of the state." Instead, the donor chose "to seek the aid of the state" and hence his representatives, the trustees, are subject to constitutional limitations (149 F. 2d at 216-217).

Having accepted similar aid here, it makes no difference that respondents retained title to Stuyvesant Town. "Ownership does not mean absolute dominion." *Marsh* v. *Alabama, supra,* 326 U. S. at 506.

4. Respondents themselves recognize that they are distributing State-created benefits (*supra,* p. 12). As the dissenting judges noted, they are the "chosen instrument for this public purpose" (R. 266). They are "repositories of official power . . . governmental instruments. . . . What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon, supra,* 286 U. S. at 88.

That mandate is directed to respondents by the Constitution itself; it operates directly and without regard to whether the statute and contract under which respondents operate specifically command, permit, or forbid discrimination. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373-374 (1886).

The question in the present case is whether the state support given to Stuyvesant Town and the state supervision of its activities impose higher responsibilities than those governing unsubsidized and unregulated landlords.

In determining that question, it is immaterial that Stuyvesant Town is privately owned, as the cases above show. It is irrelevant even that it is a corporation; the case would be no different if the State had lent its support to private individuals such as those involved in the *Shelley* case, *supra*. Above all, it is irrelevant that the State has acted through a private agency.

What is decisive, we submit, is that the State has acted—that it has provided for housing on a large scale by the use of state powers and under state control. Because of this, respondents' discrimination is not "merely private conduct", free of the restraints of the Fourteenth Amendment. As in the *Shelley* case *supra*, "here there was more" (334 U. S. at 13).

For the reasons noted above, the decision below is not in accord with the applicable decisions of this Court. The Court of Appeals viewed those cases far too narrowly in concluding that "State action . . . has hitherto been found only in cases where the State has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State" (R. 255). See particularly the *Steele* and *Kerr* cases, *supra*, and the several cases in which State and lower Federal courts have forbidden discrimination in privately operated, state constructed facilities. *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (1948); *Kern* v. *City Commissioners of Newton*, 151 Kan. 565 (1940); *Culver* v. *City of Warren* (Ohio App.), 83 N. E. 2d 82 (1948).

D. In any case, we believe that this case comes even within the formula of the court below since the City did "consciously" aid the discrimination.

1. As noted above (pp. 7-8), the discrimination practiced here was proclaimed in advance at a time when it could have been prevented. The court below itself recognized this: "Certainly the general impression was created—which Metropolitan did nothing to dispel—that Stuyvesant Town would not rent to Negroes" (R. 249).

When the contract was before the Board of Estimate, it was told by a succession of witnesses that respondents intended to exclude Negroes (*supra*, p. 7). The Board member who cast three of the five negative votes made it clear that he viewed the Board's action as affirmative approval of discrimination (R. 165-168). Furthermore, when the City subsequently did prohibit discrimination in tax-aided projects, it created an exception applicable only to Stuyvesant Town (*supra*, p. 8).

This Court established the unconstitutionality of racial zoning more than thirty years ago. *Buchanan* v. *Warley*, *supra*. In accordance with that principle it would strike down the present contract if it expressly required exclusion of Negroes. It can make no difference that the understanding that Negroes would be barred was implicit rather than express.

Certainly, the Stuyvesant Town area is now effectively "zoned" against Negroes. Further redevelopment projects may just as effectively zone minority groups into or out of adjacent areas. The result will differ from the ordinary casual grouping of neighborhoods because, and to just the extent that, government support and control give permanence and stability to the project patterns.

2. When the City was informed that discrimination was to be practiced in the project for which it was contracting, it should have taken appropriate steps to forbid it. The obligation of a state agency to extend equal protection of the laws is not exclusively negative. It must not only refrain from discrimination itself but must also see to it that its agents, those who dispense its benefits, and those who act under its control, also adhere to constitutional principles. *Cf. Kern* v. *City Commissioners of Newton*, 151 Kan. 565 (1940). The City had ample power to do so under Section 15 of the statute (*supra*, pp. 13-14).

We submit that since the City could, and under the Constitution should, have prohibited racial discrimination by respondents, the constitutional restraints have a direct thrust which requires that the discrimination be restrained.

II

The decision below raises a Federal question of substance and importance.

Even if the existing decisions of this Court do not directly compel a decision in petitioners' favor, they certainly do not affirmatively support respondents' defense of discrimination. Thus, at the very least, a Federal question of substance is presented, not heretofore decided by this Court, within the meaning of Rule 38(5)(a).

A. The opening sentences of the prevailing and dissenting opinions below disclose the substantial nature of the question here presented. The majority opinion says: "This appeal . . . raises the important question of whether a corporation organized under the Redevelopment Companies Law has the privilege, admittedly possessed by an ordinary private landlord, to exclude Negroes from consideration as tenants" (R. 241). The dissenting opinion opens on a similar note: "Undenied and undeniable is the fundamental proposition that 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality' . . . The average citizen, aware of that truth but unschooled in legal niceties, will, I venture, find the decision which the court now makes extemely perplexing" (R. 256-257).

The two opinions reveal a sharp division on the interpretation of the line of recent decisions of this Court on the meaning of "state action." Plainly, even the four prevailing judges considered that the constitutional issue was substantial.[3]

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[3] The special problems raised by the discrimination at Stuyvesant Town were the subject of comment by the President's Committee on Civil Rights in its Report, "To Secure These Rights," October, 1947, p. 70 (Gov. Print. Off.). Since Justice Benvenga's decision

B. The constitutional issue presented is one of general importance. It affects directly all housing constructed under the New York Redevelopment Companies Law and the many parallel laws of other States (*infra*, pp. 23-24). More broadly it affects a *kind* of institution which is certain to increase in importance in the coming years. It involves the question whether the prohibition of governmental discrimination embodied in the Fourteenth Amendment may be avoided in a contract between a State and a private company which calls for the exercise of governmental powers and the grant of governmental support.

1. Stuyvesant Town cannot be placed in any of the simple categories with which early constitutional doctrine dealt. The court below called it one of the "institutions created to meet the social and industrial necessities of our times" (R. 255). It is designed to meet needs which "cannot be remedied by the ordinary operations of private enterprise," as the New York Legislature found (Act, Sec. 2). The City itself has now officially recognized that it is at least "quasi-public housing."[4]

The essential feature of this institution is that its construction would not have been possible without active state participation, city subsidy, city condemnation and city contract. In other words, neither Stuyvesant Town

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in the trial court, it has been discussed in five articles in legal periodicals, four of which criticized the result which he reached. *"Exclusion of Negroes from Subsidized Housing Projects,"* 15 Chicago L. R. 745, 749-750; Comment, *"Race Discrimination in Housing,"* 57 Yale L. J. 426, 437-444; Note, *"Applicability of the Fourteenth Amendment to Private Organizations,"* 61 Harvard L. R. 344, 349-352; Note, *"The Disintegration of a Concept-State Action under the 14th and 15th Amendments,"* 96 Univ. of Pennsylvania L. R. 402, 413-414. The fifth reached the opposite conclusion, although it also criticized Justice Benvenga's reasoning. Comment, 34 Virginia L. R. 345 (1948). We have found no other comments either before or since the decision of the Court of Appeals.

[4] It is so described in "Housing—a Report to Mayor William O'Dwyer", published by the New York City Housing Authority in August, 1949.

nor anything like it could have been constructed by private agencies alone. As the dissenting judges noted (R. 262-263):

> Stuyvesant is in no sense an ordinary private landlord. Its title bespeaks its character. With buildings covering many city blocks, housing a population of twenty-five thousand persons, Stuyvesant is a "Town" in more than name. Its very being depended upon constitutional amendment, statutory enactment and city contract. The exercise of a number of governmental functions was absolutely prerequisite to its existence.

2. While the constitutional question raised by this cooperation between a State and private enterprise is new, the cooperation itself is not. The reason the constitutional question has not arisen before is that in the past, when the cooperation existed, a prohibition of racial discrimination was taken for granted.

Thus, condemnation and tax-exemption have traditionally been used to assist publicly-regulated utilities such as railroads and power companies. However, statutes as well as common law principles forbid arbitrary discrimination by such agencies;[5] hence, the constitutional question raised here has not arisen with respect to them.

When the State extends its power of condemnation to facilities other than public utilities, common law principles still require that the facilities be open to all. In the only two cases which we have found in which the question was raised at common law, the courts have concluded that the benefits of the exercise of eminent domain cannot be made available on a racially discriminatory basis. *Connecticut College* v. *Calvert*, 87 Conn. 421 (1913); *University of Southern California* v. *Robbins*, 37 Pac. (2d) 163 (Cal. App.), cert. denied, 295 U. S. 738 (1934).

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[5] 51 Corpus Juris, p. 7; Pond, *Public Utilities*, Vol. I, pp. 582-584 (Bobbs-Merrill, 1932); Collier, *Public Service Companies*, pp. 272-276 (F. H. Thomas, 1918). See also *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37, n. 16 (1948).

With Stuyvesant Town, cooperation between a State and private enterprise enters a new field, that of housing. Redevelopment laws have now been enacted in 25 States, the District of Columbia, and Puerto Rico.[6] All of these

[6] STATE	STATUTE
ARKANSAS	Ark. Stat. (1947 Rev.), Tit. 19, Sec. 3056 et seq. (Laws of 1945)
CALIFORNIA	Calif. Gen. Laws (Deering, 1947 Supp.), Act 1500, Sec. 1 et seq. (statutes of 1945 as amended, Stat. 1947)
COLORADO	Col. Stat. Ann. (Cum. Supp. 1947), Ch. 82, Sec. 62 et seq. (Laws 1945)
CONNECTICUT	Conn. Gen. Stat. (1945 Rev.), Ch. 55, Sec. 979 et seq. (Laws 1945)
DISTRICT OF COLUMBIA	D. C. Code (1948 Supp.), Ch. 7, Sec. 5-701 et seq. (Public Laws of 1945)
FLORIDA	Fla. Stat. Ann. (Cum. Supp. 1948), Ch. 421, Sec. 421.08 et seq. (Laws of 1945)
GEORGIA	Ga. Code Ann. (Cum. Supp. 1947), Tit. 99, Sec. 1201a et seq. (Acts 1946)
ILLINOIS	Ill. Stat. Ann. (Jones, 1947 Supp.), Sec. 62.123 et seq. (Laws 1947)
INDIANA	Ind. Stat. Ann. (Burns, Cum. Supp. 1947), Tit. 49, Sec. 8501 et seq. (Acts 1945)
KANSAS	Kan. Gen. Stat. (1947 Supp.), Art. 47, Sec. 17-4701 et seq. (Laws 1943)
KENTUCKY	Ky. Rev. Stat. (Baldwin, 1943), Ch. 99, Sec. 99.001 et seq. (Laws 1942)
MARYLAND	Md. Const. Art. XI B (as amended Acts of 1944, Ch. 640, ratified November, 1948)
MASSACHUSETTS	Mass. Ann. Laws (Cum. Supp. 1948), Ch. 121A, Sec. 1 et seq. (Laws 1947)
MICHIGAN	Mich. Stat. Ann. (1949 Rev.), Ch. 54, Sec. 5.3059 (1) et seq. (Acts 1941 as amended Acts 1945)
MINNESOTA	Minn. Stat. Ann. (1948 Supp.), Ch. 462, Sec. 462.411 et seq. (Laws 1947)
MISSOURI	Mo. Rev. Stat. Ann. (1948 Supp.), Ch. 38, Sec. 7875.44 et seq. (Laws 1946, as amended Laws 1947)
NEW HAMPSHIRE	N. H. Laws of 1947, Chs. 169, 210
NEW JERSEY	N. J. Stat. Ann. (1948 Supp.), Tit. 55, Ch. 140 (Laws 1944)

[Footnote 6 continued on following page.]

laws permit assembling of the land by condemnation.[7] Nine permit grants of tax exemptions in varying degrees.[8] Twenty-two permit the administering agency to regulate

[8] STATE (continued)	STATUTE
NEW YORK	N. Y. Unconsolidated Laws, Sec. 3401 et seq. (Laws 1942 as amended Laws 1943, 1947)
OREGON	Oregon Laws of 1949, Ch. 562, Sec. 1, p. 907 et seq.
PENNSYLVANIA	Penn. Stat. Ann. (Purdon, 1949), Tit. 35, Ch. 18A, Sec. 1701 et seq. (Laws 1945)
PUERTO RICO	Puerto Rico Acts of 1947, Act No. 97 (approved May 9, 1947)
RHODE ISLAND	R. I. Acts and Resolves of 1946, Ch. 1802 as amended, Acts and Resolves of 1948, Ch. 2029
SOUTH CAROLINA	S. C. Stat. at Large of 1946 No. 531, p. 1450 et seq.
TENNESSEE	Tenn. Code Ann. (Williams, 1948 Supp.), Art. II, Ch. 2B, Sec. 3647.52 et seq. (Acts 1945)
VIRGINIA	Va. Code of 1942 (Cum. Supp. 1948), Tit. 26B, Ch. 125B, Sec. 3145 (4), (8) (Acts 1946)
WISCONSIN	Wisc. Stat. (1947), Sec. 66.43 (1945 Stats.)
[7] ARKANSAS	Sec. 3058, incorporating by reference Sec. 3015
CALIFORNIA	Secs. 74, 75
COLORADO	Sec. 68 (a)
CONECTICUT	Sec. 982
DISTRICT OF COLUMBIA	Sec. 5-704
FLORIDA	Sec. 421.08, subdivision 3
GEORGIA	Secs. 1202a, 1204a
ILLINOIS	Sec. 63.137
INDIANA	Sec. 8517
KANSAS	Sec. 17-4716
KENTUCKY	Secs. 99.210 (Supp. 1949), 99.220
MARYLAND	Art. XI B, Sec. 1
MASSACHUSETTS	Ch. 121A, Sec. 11
MICHIGAN	Sec. 5.3058 (17)
MINNESOTA	Secs. 462.675, 462.445, subd. 6
MISSOURI	Sec. 7875.55
NEW HAMPSHIRE	Ch. 210, Sec. 3
NEW JERSEY	55:14D-20
NEW YORK	Sec. 3420
OREGON	Ch. 562, Sec. 3

[Footnotes 7 and 8 continued on following page.]

the use of the land and the rents and profits of the operating authority.[9]

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[7] Continued:

PENNSYLVANIA	Ch. 18A, Sec. 1712
PUERTO RICO	Act No. 97, Sec. 4
RHODE ISLAND	Acts of 1948, Ch. 2029, Sec. 2
SOUTH CAROLINA	Sec. 4, p. 1453
TENNESSEE	Sec. 3647.54
VIRGINIA	Sec. 3145 (8) (c)
WISCONSIN	Sec. 66.43 (4)

[8]

INDIANA	Sec. 8524
KANSAS	Sec. 17-4711
MASSACHUSETTS	Ch. 121A, Sec. 10
MICHIGAN	Sec. 5.3058 (12)
MINNESOTA	Secs. 462.545, 462.651
MISSOURI	Sec. 7875.53
NEW JERSEY	55:14D-20, 55:14D-23
NEW YORK	Sec. 3426
PENNSYLVANIA	Ch. 18A, Sec. 1713

In addition to these states, Connecticut, while not granting the municipality the right to exempt a redevelopment project from taxation, does grant the cities power to aid these projects by a gift of municipal funds. Gen. Stat., Ch. 55, Sec. 983.

[9]

ARKANSAS	Sec. 3058 incorporating by reference Sec. 3012
DISTRICT OF COLUMBIA	Sec. 5-709
FLORIDA	Sec. 421.08, sub. Sec. 5
GEORGIA	Sec. 1204a
ILLINOIS	Sec. 63.145
INDIANA	Sec. 8519
KANSAS	Sec. 17-4706
KENTUCKY	Secs. 99.030, 99.050
MASSACHUSETTS	Ch. 121A, Sec. 15
MICHIGAN	Sec. 5.3058 (4) (l)
MINNESOTA	Sec. 462.645, subdivision 5
NEW HAMPSHIRE	Ch. 210, Sec. 5
NEW JERSEY	55:140-15
NEW YORK	Secs. 3408, 3415
OREGON	Ch. 562, Sec. 5
PENNSYLVANIA	Sec. 1711, subdivisions (a) (9); (b)
PUERTO RICO	Act No. 97, Sec. 7
RHODE ISLAND	Acts 1946, Ch. 1802, Secs. 54, 66
SOUTH CAROLINA	Sec. 7, p. 1454
TENNESSEE	Sec. 3647.56
VIRGINIA	Sec. 3145 (8) (d)
WISCONSIN	Sec. 66.43 (6) (c)

Thus urban redevelopment has become a principal device for the replanning and rebuilding of extensive areas throughout the country. The operation of all the projects constructed under these laws may be affected by this case.

Negroes occupy many of the slum areas in our cities. In fact, the proportion of substandard housing units occupied by non-whites is almost six times that for whites and the proportion of overcrowding of non-whites exceeds by four times that for whites. [10]

These slum areas are the areas most subject to clearance under urban redevelopment.[11] Public clearance programs can eliminate the Negro population of an entire county.[12]

Neither vacant sites nor vacant residential units within the existing supply of shelter are available today to facilitate the relocation of these minorities.[13] Thus, unless they are assured of equal treatment in the new projects, tens of thousands of Negro families, regardless of their economic status, may be rendered homeless in the name of urban redevelopment.

It is therefore very important that the long-debated question whether there may be racial discrimination in redevelopment projects be finally decided. Uncertainty on this issue creates serious difficulties in the administration of the new statutes. The four to three decision below cannot be regarded as the final answer by the administering state and city agencies or by the growing number of private companies operating the projects.

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[10] *Housing of the Non-White Population,* Washington, D. C., Housing and Home Finance Agency, June, 1944.

[11] Robert Weaver, *Negro Ghettos,* New York, Harcourt, Brace & Co., 1948; p. 326.

[12] Hearings before a Sub-Committee of the Committee on the District of Columbia, U. S. Senate, 78th Congress, April, May, June, 1944, pp. 1129, 1131.

[13] George B. Nesbit, Racial Relations Officer, Public Housing Administration, "Relocating Negroes from Urban Slum Clearance Sites," *Land Economics,* August, 1949, p. 279.

The issue, however, also cuts deeper. There is no reason why this new form of state cooperation with private enterprise should be limited to urban redevelopment. As the court below recognized, Stuyvesant Town is but a sample of the "increasing and fruitful participation of government, both State and Federal, in the industrial and economic life of the nation" (R. 256).

Under our Constitution, this participation cannot be governed solely by the morals of the marketplace. Whether the Stuyvesant Town housing is worth the amount which went into its subsidies is unimportant. Agreements between States and private parties cannot be tested merely by examining the *quid pro quo*. In the words of the dissenting judges below (R. 266):

> It is impossible to balance the essence of democracy against fire-proof buildings and well-kept lawns, and, fortunately, the Constitutions, Federal and State, forbid our putting the former into the judicial scales just as they forbade the city officials from putting it upon the bargaining table. The mandate that there be equal protection of the laws, designed as a basic safeguard for all, binds us and respondents as well to put an end to this discrimination.

CONCLUSION

This case deals with a third attempt to corrupt a legitimate device for sound community planning into an instrument for enforcing racial segregation. The first, the zoning ordinance, was designed to promote sound neighborhoods. Soon it became a device for segregating Negroes. When it was invalidated by this Court in 1917 (*Buchman* v. *Warley*, 245 U. S. 60), the racial restrictive covenant came into vogue. Originally designed to exclude glue and gunpowder factories, charnel houses and other intrusions upon neighborhood dignity, the covenant became a device to bar whole races from shelter. It was held

unenforceable by this Court in 1948 (*Shelley* v. *Kraemer*, 334 U. S. 1). Now urban redevelopment laws, enacted to clear and rehabilitate slums, are being corrupted to remove unwanted minorities from building sites and to keep them out of the newly built neighborhoods. The device of "cooperation" between the State and private enterprise becomes "cooperation" to exclude Negroes. Thus again an effort is made to turn a useful social reform into an instrument for oppression and this Court is again called upon to prevent impairment of the fundamental constitutional principle of equality.

For the reasons stated above, we respectfully submit that this petition for a writ of certiorari should be granted.

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October 14, 1949.

APPENDIX

1. United States Constitution, Fourteenth Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

2. New York State Constitution, Article XVIII

Section 1. Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

Section 2. For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may * * * grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities. * * *

3. Redevelopment Companies Law of New York State (Laws 1942, Ch. 845, as amended by Laws 1943, Ch. 234, McKinney's Unconsolidated Laws, Sections 3401-3426)

* * * * * *

Section 2. Policy of state and purpose of act. It is hereby declared that in certain areas of municipalities located within this state there exist substandard conditions and insanitary housing conditions owing to obsolescence, deterioration and dilapidation of buildings, or excessive land coverage, lack of planning, of public facilities, of sufficient light, air and space, and improper design and arrangement of living quarters; that there is not in such areas a sufficient supply of adequate, safe and sanitary dwelling accommodations properly planned and related to public facilities; that modern standards of urban life require that housing be related to adequate and convenient public facilities; that the aforesaid substandard and insanitary conditions depress and destroy the economic value of large areas and by impairing the value of private investments threaten the sources of public revenues; that the public interest requires the clearance, replanning, reconstruction and neighborhood rehabilitation of such substandard and insanitary areas, together with adequate provision for recreational and other facilities incidental and appurtenant thereto according to the requirements of modern urban life and that such clearance, replanning, reconstruction and neighborhood rehabilitation are essential to the protection of the financial stability of such municipalities; that in order to protect the sources of public revenue it is necessary to modernize the physical plan and conditions of urban life; that these conditions cannot be remedied by the ordinary operations of private enterprise; that provision must be made to encourage the investment of funds in corporations engaged in providing redevelopment facilities to be constructed according to the requirements of city planning and in effectuation of official city plans and regulated by law as to profits, dividends and

disposition of their property or franchises; that provision must be made to enable insurance companies to provide such facilities, subject to regulation by law as to the return from such facilities and the disposition of property acquired for such purpose; and that provision must also be made for the acquisition for such corporations and companies at fair prices of real property required for such purposes in substandard areas and for public assistance of such corporations and companies by the granting of partial tax exemption; that the cooperation of the state and its subdivisions is necessary to accomplish such purposes; that the clearance, replanning and reconstruction, rehabilitation and modernization of substandard and insanitary areas and the provision of adequate, safe, sanitary and properly planned housing accommodations in effectuation of official city plans by such corporations and companies in these areas are public uses and purposes for which private property may be acquired for such corporations and companies and partial tax exemption granted; that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

Section 3. As used in this act, the following terms shall mean and include:

* * * * * *

10. "Supervising agency." The municipal comptroller in a municipality having a comptroller; in a municipality having no comptroller, the chief financial officer of such municipality. However, as to any insurance company providing dwelling accommodations pursuant to this act, or if any of the stock and income debenture certificates having voting power of a redevelopment company are or are

to be issued to one or more insurance companies, the term shall mean only the superintendent of insurance.

Section 4. A redevelopment company may be created by three or more persons signing, acknowledging and filing a certificate which shall contain:

* * * * * * *

11. A provision that, so long as this act shall remain applicable to any project of the redevelopment company, the real property of the redevelopment company shall not be sold, transferred or assigned except as permitted by the terms and provisions of this act.

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13. A declaration that the redevelopment company has been organized to serve a public purpose and that it shall be and remain subject to the supervision and control of the supervising agency except as provided in this act, so long as this act remains applicable to any project of the redevelopment company; that all real and personal property acquired by it and all structures erected by it, shall be deemed to be acquired or created for the promotion of the purposes of this act.

14. A declaration that, after providing for all expenses, taxes and assessments, there shall be paid annually out of the earnings of the redevelopment company for interest, amortization, depreciation and dividends, a sum equal to but not exceeding six per centum of the total actual final cost of the project as defined by subdivision two of section thirteen of this act; that the obligation in respect to such payments shall be cumulative, and any deficiency in interest, amortization, depreciation and dividends in any year shall be paid either from any cash surplus derived from earnings remaining in the treasury of the redevelopment company in excess of the amount necessary to provide such cumulative annual sums or from the first available earnings in subsequent years; and that any cash surplus derived from earnings remaining in the treasury of the

redevelopment company, in excess of the amount necessary to provide such cumulative annual sums shall, upon dissolution of the company, be paid into the general fund of the municipality.

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Section 5. If any certificate of incorporation of a redevelopment company shall be presented to the secretary of state he shall not file such certificate unless a certificate of the consent of the supervising agency shall accompany the same. A certificate of amendment of a certificate of incorporation shall not be filed by the secretary of state unless a certificate of the consent of the supervising agency and a certificate of consent of the local legislative body of the municipality in which the project is located shall accompany the same.

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Section 8. Subject to the provisions of section twenty-four of this act, there shall be paid annually out of the earnings of the redevelopment company, after providing for all expenses, taxes and assessments, a sum for interest, amortization, depreciation and dividends, equal to but not exceeding six per centum of the total actual final cost of the project as defined by subdivision two of section thirteen of this act; the obligation in respect of such payments shall be cumulative, and any deficiency in interest, amortization, depreciation and dividends in any year shall be paid either from any cash surplus derived from earnings remaining in the treasury of the redevelopment company in excess of the amount necessary to provide such cumulative annual sums or from the first available earnings in subsequent years; and any cash surplus derived from earnings remaining in the treasury of the redevelopment company in excess of the amount necessary to provide such cumulative annual sums shall, upon dissolution of the company, be paid into the general fund of the municipality except as otherwise contemplated by subdivision five of section twenty-four of this act.

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Section 13. In addition to limitations prescribed by this act a redevelopment company shall not have power to:

1. Acquire any real property or interest therein for a project or projects unless the supervising agency and the local legislative body determine as provided in this act that such acquisition is necessary or convenient for the public purpose defined in this act.

2. Issue its stock, debentures and bonds covering any project undertaken by it in an amount greater in the aggregate than the total actual final cost of such project. The actual cost of such project shall include the cost of the lands and improvements constituting the project and charges for financing and supervision approved by the supervising agency, condemnation charges and interest and other carrying charges during the period of acquisition and of construction. The total actual final cost shall be deemed to be an amount equal to such actual cost plus an allowance for working capital. Such allowance for working capital shall not exceed an amount equal to three per centum of the estimated cost or of the total actual final cost of the project if that shall be greater than the estimated cost.

3. Enter into contracts for the payment of salaries to officers or employees, or for the construction or for the substantial repair, improvement or operation of projects except subject to the approval of the supervising agency.

Section 14. The project or projects of any redevelopment company shall be designed and used primarily for housing purposes, but portions of the project may be planned and used for business, commercial, cultural or recreational purposes appurtenant thereto as approved in the project.

Section 15. Every plan or plan of a project proposed by a redevelopment company shall contain a general description of the area to be redeveloped and a statement

of the plan of redevelopment with such detail of information with reference thereto as may be necessary to a general understanding thereof.

After preliminary approval thereof by the supervising agency as to conformity with the provisions and purposes of this act, every such plan or plan of a project shall be submitted to the planning commission for approval of the plan or plan of the project relating to:

1. Height and bulk of structures, density of population, and percentage of land coverage by structures as to their conformity with the purposes of this act and with the master plan, if any; and the relationship of the density of population contemplated by the plan or plan of the project to the distribution of the population of the municipality in other areas or parts thereof, and

2. Provision, if any, for business or commercial facilities appurtenant to the plan or project relationship to existing and planned public facilities, adequacy and planned rearrangement of street facilities and provisions for light, air, cultural and recreational facilities as to their conformity with the purposes of this act and their adequacy for accommodation of the density of population contemplated by the plan or plan of the project.

The planning commission, after public hearing on a plan or plan of a project, may:

a. Issue an unqualified certificate of approval thereof, or
b. Issue a certificate of conditional or qualified approval thereof, with or without recommendations, or
c. Disapprove thereof.

After action thereon by the planning commission, such plan or plan of a project with a proposed form of contract between the municipality and the company or, when all stock, debentures and mortgage bonds of the company are owned or are to be owned by one or more insurance companies, between the municipality, redevelopment company and such insurance company or companies shall be sub-

mitted by the redevelopment company, with a certificate of approval of the supervising agency and the certificate or a statement of action on the plan or project by the planning commission, to the local legislative body for its approval as to conformity with the provisions and purposes of this act, the extent of the tax exemption to be granted pursuant to section twenty-six, the amount and nature of the property to be condemned for the redevelopment company by the municipality and the terms and conditions of payment therefor by the redevelopment company, the amount of publicly owned land or facilities to be sold to the redevelopment company or exchanged for redevelopment company-owned lands and the availability of other suitable dwelling accommodations for families living in the area or part thereof to be affected by the plan or plan of the project.

As part of an approved project the local legislative body may require a redevelopment company to dedicate to the municipality or any agency thereof in the manner provided by law specified portions of the land in a project for parks, streets, public recreational and other public purposes.

The contract shall regulate the rents to be charged for rooms in the project and may contain such other provisions, not inconsistent with this act, as may be deemed necessary or desirable for the financing, construction, operation and supervision of the project.

In any case where the planning commission shall have issued a certificate of unqualified approval of a plan or plan of a project approval thereof by the local legislative body may be by resolution adopted by a majority of the whole number of votes authorized to be cast by all of the members thereof. In any case where the planning commission shall not have issued a certificate of unqualified approval, the plan or plan of a project may nevertheless be approved by the local legislative body, after public hearings thereon, by resolution adopted by a three-fourths vote of the whole number of votes authorized to be cast by all

of the members thereof. The local legislative body is authorized to enter into the necessary contract or contracts on behalf of the municipality.

If the contract parties are a municipality, a redevelopment company and one or more insurance companies which own or will own all of the stock, debentures, bonds and mortgage indebtedness of such redevelopment company, or if the project is undertaken by an insurance company, then the certificate of the supervising agency approving such contract shall terminate the functions of the supervising agency pursuant to this act, and after the execution of such contract all references herein to the approval or other action by the supervising agency shall be inapplicable to the project provided for in such contract and to such redevelopment company or the insurance company undertaking such project.

Section 16. It shall be unlawful during the period of tax exemption, granted pursuant to section twenty-six of this act, for any redevelopment company or any successor in interest to its title to a project or any part thereof to change or modify any feature of a project for which approval of the planning commission is required by this act, without the approval of such commission, except by a three-quarters vote of the local legislative body.

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Section 20. A municipality may take property by condemnation for a redevelopment company, provided the contract or contracts executed pursuant to section fifteen contain a requirement that the company shall pay to the municipality all sums expended or required to be expended by the municipality in the acquisition of such real property, provision as to the time of payment and manner of securing payment thereof, and provisions requiring that the municipality receive, before proceeding with the acquisition of such real property, such assurances as to payment or reimbursement by the redevelopment company, or otherwise, as the local legislative body may deem advisable.

• • • Upon compliance by the redevelopment company with the applicable terms and conditions of such contract or contracts the municipalitity shall proceed to acquire title to the real property and when title to the real property shall have vested in the municipality, it shall convey the same to the redevelopment company upon final compliance by the redevelopment company with such terms and conditions. As soon as title shall have vested in the municipality, the redevelopment company may, upon the authorization of the mayor, enter upon the real property taken, take over and dispose of existing improvements, and carry out the terms of the project with respect thereto.

Real property in an area, needed or convenient for the project, which is to be acquired by condemnation pursuant to this section, may be acquired by the municipality for the project, including any property devoted to a public use, whether or not held in trust, notwithstanding that such property may have been previously acquired by condemnation or is owned by a public utility corporation, it being hereby expressly determined that the public use in conformity with the provision of this act shall be deemed a superior public use. The local legislative body may consent to the condemnation of property owned by the municipality, whether or not such property be held in trust, or may sell or lease any such property necessary or convenient for a project of a redevelopment company without public bidding, provided notice of such sale or lease is published and a public hearing is held before the local legislative body. The term of any such lease shall not be limited by any provision of any general, special or local law or city charter limiting the period of time during which a lease or any renewal thereof may run. Real property belonging to a public utility corporation may not be acquired without the approval of the commission or other office or tribunal having regulatory power over such corporation.

An award of compensation shall not be increased by reason of any increase in the value of the real property

caused by the assembly, clearance or reconstruction, or proposed assembly, clearance or reconstruction for the purpose of this act of the real property in an area.

A local legislative body, upon payment therefor or upon exchange for other lands, may convey to any redevelopment company land in any street or public place which is duly closed or discontinued pursuant to the plan of a project.

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Section 21. The supervising agency shall:

Examine each redevelopment company and keep informed as to its general condition, its capitalization and the manner in which its property is constructed, leased, operated or managed with respect to its compliance with all provisions of law and orders of the supervising agency.

The supervising agency may:

1. Either itself or through its inspectors or employees duly authorized by it, enter in or upon and inspect the property, esuipment, buildings, plants, offices, apparatus and devices of any redevelopment company; examine all books, contracts, records, documents and papers of any redevelopment company and by subpoena duces tecum compel the production thereof.

2. In its discretion, prescribe uniform methods and forms of keeping accounts, records and books to be observed by redevelopment companies, and after a hearing to prescribe by order accounts in which particular outlays and receipts shall be entered, charged or credited.

3. Require specific answers to questions upon which it may desire information and require the filing of periodic reports in the form, covering the period, and at the time prescribed by it.

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Section 23. Until the termination of the tax exemption, whether by expiration or by any other cause, a redevelopment company, heretofore or hereafter organized, shall not have power to sell any project without the consent of the local legislative body.

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Section 24. 1. After termination of any tax exemption granted pursuant to section twenty-six of this action, whether by expiration or by any other cause, or in the event that prior thereto the redevelopment company elects to pay to the municipality the total of all accrued taxes for which such exemption was granted and received, together with interest at the rate of five per centum per annum, the redevelopment company may voluntarily dissolve, and title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the redevelopment company may be dissolved and reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, after providing, in any case, for the payment of all current operating expenses, taxes, indebtedness and all accrued interest thereon, and the par value of and accrued dividends on the outstanding stock of the redevelopment company. If, after making such provision and after the conveyance of the project, a cash surplus remains in the treasury of the redevelopment company, such cash surplus shall, upon dissolution, be paid into the general fund of the municipality. After such dissolution and conveyance or such reconstitution, the provisions of this act shall become and be inapplicable to any such project and its owner or owners, and any tax exemption granted to such redevelopment company pursuant to section twenty-six of this act shall cease and terminate.

2. If prior to the termination of any tax exemption the project is sold for any reason, the redevelopment company shall dissolve, and any tax exemption granted to such redevelopment company pursuant to section twenty-

six of this act shall cease and terminate, except as otherwise provided in section twenty-three of this act. In such case the stockholders and income debenture certificate holders shall in no event receive more than the par value of their stock and the face value of their income debenture certificates with accrued and unpaid dividends or interest upon such stock and income debenture certificates, and any remaining surplus shall be paid into the general fund of the municipality.

3. In no event shall a redevelopment company be voluntarily dissolved unless provision is made for the payment in full of the remaining balance of principal and interest due or unpaid upon any mortgage on its property or any part thereof, but any project may, with the consent of the local legislative body of the municipality, be conveyed and transferred to the municipality subject to such mortgage and accrued interest.

4. Unless the local legislative body of the municipality shall consent to the voluntary dissolution of a redevelopment company, such a company shall not dissolve except in accordance with subdivisions one and two of this section or upon the expiration of the period of corporate existence as fixed by its certificate of incorporation.

5. With the consent of the local legislative body and the superintendent of insurance, a redevelopment company heretofore or hereafter organized may voluntarily dissolve prior to the termination of any tax exemption granted pursuant to section twenty-six of this act and title to the project may be conveyed, and all other assets of such redevelopment company may be transferred, to an insurance company, whether or not such project shall have been theretofore completed. After such dissolution and conveyance such tax exemption shall continue for the period of years originally provided for in the contract, or for the unexpired portion thereof if such period shall have theretofore commenced, subject to prior termination pursuant to

section twenty-five or section twenty-six of this act, and the provisions of this act shall thereafter be applicable to such project and to such insurance company to the same extent and with the same force and effect as though such project had been initially undertaken by such insurance company pursuant to section twenty-five of this act; provided, however, that nothing herein contained shall be deemed to require the re-submission of the plan of the project and the contract relating thereto for approval pursuant to section fifteen of this act.

6. The contract with the municipality may contain such other provisions for the dissolution of the redevelopment company as may be deemed advisable, not inconsistent with the provisions of this section. In case of a dissolution and conveyance in accordance with subdivision five of this section, the contract may be modified consistently with the provisions of said subdivision five and section twenty-five of this act, any such modifications to be approved by the superintendent of insurance and the local legislative body.

7. Upon dissolution as provided in this section, this act shall become and be inapplicable to the project and its owner or owners except as otherwise contemplated by subdivision five of this section.

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Section 26. The local legislative body of any municipality in which a project of such company is or is to be located may by contract agree with any redevelopment company to exempt from local and municipal taxes, other than assessments for local improvements, all or part of the value of the property included in such project which represents an increase over the assessed valuation of the real property, both land and improvements, acquired for the project at the time of its acquisition by the redevelopment company which originally undertook the project and for such definite period of years as such contract may provide. The tax exemption shall not operate for a period

of more than twenty-five years, commencing in each instance from the date on which the benefits of such exemption first become available and effective.

A redevelopment company which has been granted and has received tax exemption pursuant to this section may at any time elect to pay to the municipality the total of all accrued taxes for which exemption was granted and received, together with interest at the rate of five per centum per annum. Upon such payment the tax exemption of the project shall thereupon cease and terminate.

4. New York City Administrative Code

Section J41-1.2. Discrimination in Tax Exempt Projects. No exemption from taxation, for any project, other than a project hitherto agreed upon or contracted for, shall be granted to a housing company, redevelopment company or redevelopment corporation, which shall directly or indirectly, refuse, withhold from, or deny to any person any of the dwelling or business accommodations in such project or property, or the privileges and services incident to occupancy thereof, on account of the race, color or creed of any such person.

Any exemption from taxation hereafter granted shall terminate sixty days after a finding by the supreme court of the state of New York that such discrimination is being or has been practiced in such project or property; if within sixty days such discrimination shall have been ended, then the exemption shall not terminate. (As added by L. L. 1944, No. 20, July 3.)